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No. 82-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

RUSSELL CREEK LAND COMPANY
and BBF, INC.,
Petitioners,

Vs.

CHARJUAN, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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DECISION BELOW

The lengthy finding of fact, conclusions of law and order of the Circuit Court of Cabell County is set forth accurately in the Petition.

QUESTION PRESENTED

There are no questions for review, requiring granting of a Writ of Certiorari to the Circuit Court of Cabell County, West Virginia.

STATEMENT OF THE CASE

The Circuit Court of Cabell County, West Virginia, decided this matter by Order dated November 6, 1981, after a hearing held on November 20, 1980. This decision was appealed to the West Virginia Supreme Court of Appeals twice and denied both times. The petitioners were the landowner and tenant of a parcel of improved real estate located in Cabell County, West Virginia. The petitioners assert a denial of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution by alleging that certain provisions of the West Virginia Code are unconstitutional. This Court's

jurisdiction is sought under 28 U.S.C. Subsection 1257(3) and Rule 17.1(c) of the Rules of the United States Supreme Court.

STATEMENT OF THE FACTS

Paramount to an understanding of the issues in this case is the time sequence of various events, the duties of ownership of real property, and the failure to execute those duties by the petitioners herein.

Russell Creek was the fee simple owner of the subject real estate which was purchased in August of 1963. At that time, Russell Creek leased the subject property to BBHE, Inc., (a predecessor by merger of BBF, Inc.). The obligation to pay the real estate taxes assessed by the Cabell County Assessor was made a provision of this Lease and was the responsibility of BBHE and subsequently BBF under that Lease. The taxes were paid on the subject real estate

from 1963 to 1974, inclusive. The taxes were not paid or tendered for 1975, 1976, 1977, 1978 and 1979. No effort was made to pay these taxes or to contact the billing or tax collecting authority (the Cabell County Sheriff) by Russell Creek or BBF during this time, notwithstanding the written tax statement mailed to BBF in September, 1975.

BBF, Inc., a national fast food service chain operating out of Columbus, Ohio, in fact, paid the 1973 and 1974 taxes on September 14, 1974, and the Cabell County Sheriff mailed a check for a tax refund to BBF as a result of an overpayment. The 1973 taxes were delinquent when paid by BBF. Between July 15 and August 1, 1975, the Cabell County Sheriff mailed notice of the taxes due to BBHE, Inc., the predecessor corporation to BBF, Inc., receipt of the mailed notice was not denied by BBF. The subject property

became delinquent for taxes on May 1, 1976. On May 15, 1976, the first notice of publication of the delinquent taxes was prepared by the Cabell County Sheriff and was published as a class 1-0 legal advertisement. On September 22, 1976, a second list of delinquent real estate taxes for 1975 calendar tax year was prepared and published likewise in the newspaper. On October 18, 1976, a tax sale of various lands delinquent for taxes in 1975 was held by the Cabell County Sheriff. This property was not purchased by anyone at the sale and pursuant to West Virginia Code Section 11(a)-3-6, the Cabell County Sheriff on behalf of the State of West Virginia bid in the property for the taxes due, $1,345.78. From October 18, 1976, until September 30, 1978, when the property was certified by the West Virginia State Auditor to be sold for the benefit of the School Fund, the property was absolutely

redeemable by Russell Creek or BBF upon the payment of all past due taxes, interest and charges due on the said real estate. After the property was certified to be sold for the benefit of the school fund under West Virginia Code Section 11A-4-1, et. seq. until April 3, 1979, the property was redeemable as a matter of grace by either BBF or Russell Creek. Taxes for the year 1975 were computed on a fiscal year basis between July 1, 1974 to June 30, 1975. They were not payable until after July 1, 1975. From July 1, 1975, until April 3, 1979, no offer, contact, payment, or other communication was made by either Russell Creek or BBF to pay the real estate taxes on the subject property.

On these facts BBF, Inc., and Russell Creek now complain that the West Virginia statutory scheme denies them due process of law as guaranteed them by the United States Constitution and Amendment

XIV thereto. The petitioners assert that the West Virginia statutes deny them notice and an opportunity to be heard both as to the time, date and place of the Sheriff's sale and a failure to provide notice of the absolute right of redemption after the property passed to the State of West Virginia under West Virginia Code Section 11A-3-6. This is plainly a misapprehension of the due process clause of Amendment IV of the United States Constitution and the West Virginia statutes.

ARGUMENT

A. Procedural Due Process:

The requirements of notice and an opportunity to be heard as defined by Mullane v. Central Hanover Bank and Trust Company, 399 U.S. 306 (1950) refer to a judicial proceeding at which a right or property interest will be adjudicated. In

that proceeding, either in rem or in personam Mullane holds that publication is not sufficient notification if the person or persons to be affected are known and his address can be obtained so that he receives personal service. In the case at bar, there was no judicial proceeding and none was required.

The amount of taxes which the petitioners owed on the subject real property in Cabell County was a matter of mathematical calculation which requires no hearing. See Hancock v. Muskogee, 250 U.S. 454 (1919); People's National Bank v. Marye, 107 F. 570 (4th Cir.) modified on other grounds 191 U.S. 272 (1901).

When the taxes became delinquent, the Sheriff, pursuant to statute, published both in the newspaper and in notices on the courthouse door.

At any time during the years in question, either petitioner could have attempted to pay the taxes and have been told of the forfeiture to the state and of its right to redeem the property. But for years, neither party even attempted to do so, notwithstanding they actively engaged in the fast food business at that address.

In the instant case, Russell Creek's property became vested in the State of West Virginia (11A-3-6), when the property is advertised for sale for delinquent taxes and there are no bidders thereon. The subject property was not purchased by a third party at the Cabell County Sheriff's tax sale.

This provision is similar to escheat statutes. See Christianson v. King County, 239 U.S. 356 (1915); Application of the People of the State of New York, 138 F.Supp 661 (1956); State v. Standard Oil Company, 5 N.J. 281, 74 A.2d 565, aff'd 341 U.S. 428

(1950). The duty is on the landowner to pay his taxes. The landowner's or his assignees failure to perform a statutorily required act cannot give the landowner or his assignee the right to shift the burden to the State of West Virginia to keep him notified as to when to pay his taxes.

In addition, respondent notes that in this case, for the years prior to 1975, the taxes were paid by BBHE, Inc., or BBF, Inc. The address of BBHE, Inc., was known. BBHE, Inc., did in fact receive written, mailed notice of the taxes due for 1975 from the Sheriff of Cabell County, West Virginia.

It has long been the law that the State may sell land for taxes; and notice by publication is not violative of due process. Leigh v. Green, Neb. 1904, 24 S. Ct. 390, 193 U.S. 92, 48 L.Ed. 623; Outlook Irr. Dist. v. Fels, 1934 28 P.2d 996, 176 Wash. 211; Spitcaufsky v. Hatten,

1944 182 S.W.2d 86, 353 Mo. 94; This matter was recently denied certiorari by this Court. Billingsley v. Wallace, 1974 297 So.2d. 362, 292 Ala. 538, certiorari denied, 95 S.Ct. 834.

The contention that statutory requirements are insufficient to give due process after a reasonable period in which to act cannot be sustained. Kaufman v. Gross & Co., 1979, 591 P.2d 1229, 23 C.3d. 750, 153 Cal. Rptr. 577. In this case the petitioners had over three (3) years in which to cure default.

It is a long established principle of law in the United States that when a party owns property, it is the responsibility of the owner to preserve and protect it.

In the words of Chief Justice John Marshall in The Mary (U.S.) 9 Cranch 126, 144, 3 L.Ed. 678, 684, "It is the part of common prudence for all persons who have any

interest in [a thing], to guard that interest by persons who are in a situation to protect it." Cited in Mullane, supra, 316.

The petitioners knew that taxes were owed on the property, knew approximately when they were due and knew to whom they were payable. The petitioners, jointly or severally, were in a situation to protect their interests in the subject property. They failed to do so and now maintain that the State is at fault for their failure to pay taxes for the last 3½ years they owned and/or operated a fast food restaurant on the subject property.

In the consideration of these questions presented to this Court, another question must be asked.

> "What could have been done by BBF or Russell Creek, even if there had been hand delivered personal notification to the Presidents of both BBF and Russell Creek concerning both matters raised in the questions presented?"

The answer is obvious. They could have paid the taxes. There was no appearance that could have been made. There was no legal determination to challenge. There was no pleading to respond to. There was nothing to do except to pay the taxes. This is exactly what could have been done without such hand delivered personal notification to the Presidents of both corporations. The responsibility is not on the State of West Virginia to see that both domestic and foreign corporations properly manage their businesses and pay their taxes. The petitioners lost nothing as a result of any "lack of notice and opportunity to be heard." They simply failed to pay their taxes to the Cabell County Sheriff as they had done for the previous eleven (11) years and could have done for the more than three and a half (3-1/2) years in question and saved their property.

Under the particular facts in this case, Russell Creek and BBF have waived and are estopped from claiming injury herein. Both Russell Creek and BBF were required by the State of West Virginia to annually report to the State of West Virginia what properties they owned and to assign a value for those properties for the purposes of taxation by Cabell County, West Virginia. These duties to report and their previous eleven (11) years of a history of paying the taxes and their failure to deny any knowledge of their responsibility to pay real estate taxes overwhelmingly shows that the petitioners herein do not have requisite standing to assert a constitutional challenge to the West Virginia statutes.

B. Substantive Due Process.

There is no substantive due process question presented in either question because of the State's overriding interest

in requiring owners of real property to timely pay their taxes. This state interest is set forth in West Virginia Code provision 11A-3-1. The only consideration is whether or not there is a reasonable period of time in which the property owner can cure his default.

Under the West Virginia statutes, the property owner has approximately two and a half (2-1/2) years if the statutory timetable is followed before the property becomes irredeemable. This right would exist for this period of time, even if the property had been sold to a third party at the Sheriff's sale. Under the facts in this case, both Russell Creek and BBF had the right to cure this default and pay the taxes and/or redeem the property from the State of West Virginia from July 1, 1975, until September 30, 1978 or some three (3) years and three (3) months.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that there is no federal constitutional questions involved and that any loss suffered by the petitioners herein is a direct result of their negligent operation of their respective businesses. They voluntarily became the owners of property in the State of West Virginia; they voluntarily used the property to make money in the State of West Virginia; and they voluntarily failed to make their annual tax payments to the State of West Virginia after eleven (11) years of so doing. For those reasons, it is respectfully submitted that the requested Writ of Certiorari should be denied.

Respectfully submitted,

James Allan Colburn
Counsel for respondents

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AFFIDAVIT OF FILING AND SERVICE

I, James Allan Colburn, counsel for the above-named respondent, do hereby certify that I did file the attached Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States Post Office with first class

postage prepaid and addressed to the Clerk of the United States Supreme Court within the time allowed for filing.

I do further certify that I did serve copies of the attached Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States mails, first class postage prepaid, addressed to each of the attorneys at their addresses listed below, on this the 7th day of March, 1983:

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James Allan Colburn

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

I, Mindy Ann Napier, a Notary Public in and for the County and State aforesaid, do hereby certify that James Allan Colburn, whose name is signed to the foregoing writing, has this day acknowledged the same before me in my said County, on this the 7th day of March, 1983.

My commission expires April 18, 1990.

Mindy Ann Napier
NOTARY PUBLIC